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No. 88-

Supreme Court, U.S.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1988

NATIONAL COAL ASSOCIATION AND
ALABAMA POWER CO., *et al.*,
Petitioners,

v.

NATURAL RESOURCES DEFENSE COUNCIL, *et al.*,
Respondents.

**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

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QUESTIONS PRESENTED

1. Whether, consistent with *Chevron U.S.A., Inc. v. NRDC*, the D.C. Circuit can reject EPA's interpretation of § 123 of the Clean Air Act, 42 U.S.C. § 7423 (1982), and require sources to conduct case-by-case demonstrations to justify stack height credit *up to* Good Engineering Practice (GEP) statutory formula height, when the plain language and EPA's interpretation of § 123 would require such demonstrations only where a source seeks GEP credit *above* GEP formula height?

2. Whether the D.C. Circuit ignored the doctrines of law of the case and *res judicata* in remanding a rule that had been upheld previously by another panel of that court, and in allowing petitioners to challenge a revised rule that fully implements what those petitioners had argued for in a previous case?

PARTIES TO THE PROCEEDINGS

This case involves challenges to final regulations promulgated by the United States Environmental Protection Agency (EPA) pursuant to § 123 of the Clean Air Act, 42 U.S.C. § 7423 (1982). The Natural Resources Defense Council (NRDC) and Sierra Club were petitioners in No. 85-1488. The States of New York, Rhode Island, Connecticut, Vermont, Maine, and New Hampshire, and the Commonwealth of Massachusetts were petitioners in No. 85-1489. The State of New Jersey was petitioner in No. 85-1554. The Environmental Defense Fund (EDF) was petitioner in No. 85-1552. Alabama Power Co., *et al.* were petitioners in No. 85-1543. Ohio Power Company was petitioner in No. 85-1556. Ormet Corporation was petitioner in No. 85-1558. The National Coal Association was petitioner in No. 85-1560. Monongahela Power Co. and Potomac Edison Co. were petitioners in No. 85-1557. The United Mine Workers of America was petitioner in No. 85-1568. Lee M. Thomas, EPA Administrator, and EPA were Respondents in all of these proceedings. The proceedings were consolidated on October 25, 1985.

Petitioners here, and intervening on behalf of respondents in certain of the petitions below (Nos. 85-1488, 85-1489, 85-1552, 85-1554), are Alabama Power Co., 64 other electric utilities,* Edison Electric Institute, National Rural Electric Cooperative Association, American Public Power Association, and National Coal Association. The other intervenors on behalf of respondents below were the American Paper Institute and National Forest Products Association (intervenors on all petitions), Kennecott (Nos. 85-1488, 85-1489, 85-1552), the Natural Resources Defense Council and Sierra Club (intervenors on all petitions except No. 85-1488), and

* A list of the individual companies that comprise Petitioners Alabama Power Co., *et al.*, and all parent companies, subsidiaries, and affiliates is contained in the supplemental appendix attached to this Petition pursuant to Rule 28 of this Court.

the State of Ohio (No. 85-1488). Participating as *amici curiae* in support of respondents on certain issues raised in Nos. 85-1488, 85-1489, 85-1552, and 85-1554 were the States of Indiana, Mississippi, and Georgia.

Two other consolidated petitions for review, one filed by Ohio Power Co. (No. 86-1331) and the other filed by Ormet Corporation (No. 86-1362), were decided in the same judgment of the court below as the preceding petitions. These two petitions, which were not consolidated with Nos. 85-1488, *et al.*, sought review of EPA's denial of an administrative petition for reconsideration of certain of the § 123 regulations. The Respondents in that proceeding were also Lee M. Thomas, Administrator, and EPA. The Natural Resources Defense Council and Sierra Club intervened on behalf of EPA in both petitions.

Pursuant to Rule 19.6 of this Court, all petitioners, respondents and respondent-intervenors below other than Petitioners here are Respondents in this Court.

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**PETITION FOR A WRIT OF CERTIORARI TO THE
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The National Coal Association, Alabama Power Co., 64 other individual electric utilities,¹ Edison Electric Institute, National Rural Electric Cooperative Association, and American Public Power Association respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered on January 22, 1988 in Case Nos. 85-1488, 85-1489, 85-1554, and 85-1552. These cases are challenges by NRDC, Sierra Club, EDF, and certain northeastern states to EPA's final § 123 rules. Petitioners had intervened in these cases below on behalf of Respondent EPA.

OPINION BELOW

The opinion of the U.S. Court of Appeals in *Natural Resources Defense Council, et al. v. Thomas, et al.*, Nos. 85-1488, *et al.* (D.C. Cir. January 22, 1988), is reported

¹ The 65 individual utility petitioners and their parent companies, subsidiaries, and affiliates are set forth in the supplemental appendix attached to the Petition pursuant to Rule 28 of this Court.

at 838 F.2d 1224. A copy of the opinion appears in the Appendix (hereinafter referred to as "App. —") at 1a-64a.

JURISDICTION

The judgment of the U.S. Court of Appeals for the D.C. Circuit was entered on January 22, 1988.² Three timely Petitions for Rehearing and Suggestions for Rehearing En Banc, and two timely Petitions for Rehearing, were denied on April 13, 1988, App. 65a-68a. This petition for a writ of certiorari is being filed within ninety days of that date pursuant to 28 U.S.C. §2101(c) (1982) and Rules 20.2 and 20.4 of this Court. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1) (1982).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The following statutory and regulatory provisions are set forth in the Appendix:

1. Clean Air Act §§ 110(a)(1)-(a)(2)(K), 123, 42 U.S.C. §§ 7410(a)(1)-(a)(2)(K), 7423 (1982), App. 172a-177a.
2. 49 Fed. Reg. 44878-44887 (1984) (Proposed Stack Height Regulations), App. 134a-171a.
3. 50 Fed. Reg. 27892-27907 (1985), recodified at 40 C.F.R. §§ 51.100(ff)-(kk) (1987) (Final Stack Height Regulations), App. 77a-133a.
4. Administrative Procedure Act §§ 4, 10(e), 5 U.S.C. §§ 553, 706 (1982), App. 178a-180a.

² The court below had jurisdiction of these cases under § 307 (b)(1) of the Clean Air Act, 42 U.S.C. § 7607(b)(1) (1982), which provides the District of Columbia Circuit with exclusive jurisdiction to review any "nationally applicable regulations . . . promulgated by the Administrator"

STATEMENT OF THE CASE

In the 1977 Clean Air Act Amendments, Congress enacted a short and simple statutory provision to codify historical engineering practice regarding the stack height needed to prevent downwash of a source's emissions to ground level. This provision, § 123 of the Act,³ defines a "good engineering practice" ("GEP") formula and requires EPA to call for case-by-case demonstrations if a source wants to justify credit above this GEP formula height. Given the simplicity of this scheme, Congress gave the Agency only six months to implement this provision through regulation.

After ten years and two decisions from the D.C. Circuit, the Agency has been required to undertake a third round of rulemaking to implement this seemingly straightforward statutory scheme. In its most recent decision, the D.C. Circuit draws distinctions between "original" and "replacement" stacks and, for sources that seek credit *up to* GEP formula height for a replacement stack, requires EPA to demand case-specific demonstrations unless the stack can be grandfathered under one of up to six separate categories of GEP grandfathering rules suggested by the court.⁴ As a practical matter, therefore, the Agency will be forced in this new round of rulemaking to abandon the simple approach of adopting a GEP formula and requiring demonstrations only where sources wish to justify above-formula height GEP credit.⁵

The lower court's decision initiates a second decade of rulemaking for EPA under a provision for which Con-

³ 42 U.S.C. § 7423 (1982), App. 176a-177a. The Clean Air Act appears at 42 U.S.C. § 7401, *et seq.* (1982) (hereinafter referred to as "CAA" or "the Act"). For convenience, all further citations will be to the Act. Parallel citations to the U.S. Code are given in the Table of Authorities.

⁴ See *NRDC v. Thomas*, 838 F.2d 1224, 1245-46 (D.C. Cir. 1988), App. 38a-40a.

⁵ See *infra* note 46.

gress anticipated final rules could be promulgated in a straightforward, six-month rulemaking proceeding. Given the shifting standards the lower court has applied in reviewing the Agency's stack height rules, there can be no assurance that this round of rulemaking will be the last.

I. THE ORIGIN OF § 123

Under the Clean Air Act, EPA has established a system of air quality regulation that is based upon "National Ambient Air Quality Standards" ("ambient standards") and "Prevention of Significant Deterioration" increments ("PSD increments").⁶ Section 110 of the Act directs the states to set emission limitations for individual sources that ensure their smokestack emissions will not, after dispersion, cause or contribute to ground level pollutant concentrations that exceed the ambient standards or PSD increments.

Of course, if there were no dispersion, it would not be possible to operate any industrial fuel-burning facility without creating ground-level pollutant concentrations that exceed ambient air quality standards and PSD increments by factors of many thousand.⁷ Thus, Congress, in adopting the Clean Air Act, and EPA in implement-

⁶ The ambient standards define maximum ground level concentrations of pollution which, if attained, will assure protection of public health and welfare. CAA §§ 108, 109. The PSD increments define the maximum increases in ground level concentrations that are allowed to occur as a result of new construction in areas where the ambient standards are met. CAA § 163.

⁷ For example, if the emissions from a well-controlled source (e.g., a power plant meeting the stringent EPA new source standards) were released at ground level without dispersion, they would create ambient concentrations of sulfur dioxide (SO_2) in the range of 900,000 micrograms per cubic meter in the vicinity of the source. By comparison, the primary (public health) ambient standard for SO_2 is 365 micrograms per cubic meter (24-hour calendar day average), and the Class II PSD increment is 91 micrograms per cubic meter (24-hour calendar day average). 40 C.F.R. §§ 50.4, 51.166(c) (1987).

ing it, have recognized that industrial activity and protection of the public health and welfare could not co-exist without some reliance on dispersion.

In the initial development of the § 110 state plans in the early 1970s, a dispute arose between EPA, the states, and other interested parties regarding the extent to which sources could rely on the dispersion that was inherent in elevated releases. EPA recognized, as had engineers before the Act came into existence, that releases must be elevated by a stack tall enough to avoid public exposure to concentrated emission plumes at ground level. On the other hand, EPA also recognized that sources might attempt to use "tall stacks" (i.e., stacks taller than engineers had traditionally thought was necessary to ensure that a concentrated emission plume would not quickly be brought to ground level due to downwash) to enhance dispersion as a means of avoiding a reduction in the volume of pollutant emissions.

In 1973, EPA proposed rules to prohibit the use of stacks taller than "good engineering practice" ("GEP") height as means of avoiding a reduction in the amount of pollutants released by the source.⁸ In that proposal, EPA defined GEP stack height as two and one-half times the height of the source ("2.5H"), the traditional engineering rule of thumb determined to be the minimum stack height that prevents downwash of a source's emissions plume to the ground.⁹ Although the 1973 proposal

⁸ 38 Fed. Reg. 25697 (1973).

⁹ *Id.* at 25700. The proposal provided that, "[f]or fairly level terrain, good engineering practice will normally result in stack height approximately two and one-half times the height of the facility and nearby obstructions." EPA recognized, however, that in rugged terrain areas, GEP height might be greater than provided by the 2.5H formula in order to avoid terrain-induced downwash. *Id.* "Downwash" occurs when the emission plume from a stack is caught in wakes or eddies downwind of a nearby structure or terrain feature and is quickly brought to the ground with only limited dilution in the ambient air.

was never promulgated, EPA refused after 1973 to approve § 110 state plans that allowed reliance on dispersion techniques such as "tall stacks," and EPA's decisions were upheld by the courts.¹⁰

In 1977, Congress added § 123 to the Act to make explicit in statutory language the 1973 policy being followed by EPA.¹¹ Section 123(c) defines GEP stack height as

the height necessary to insure that emissions from the stack do not result in excessive concentrations of any air pollutant in the immediate vicinity of the source as a result of atmospheric downwash, eddies and wakes which may be created by the source itself, nearby structures or nearby terrain obstacles (as determined by the Administrator).

Based upon the traditional engineering notion of GEP, Congress stated that GEP stack height "shall not exceed two and a half times the height of the source [the "2.5H" formula], unless the [source] owner or operator demonstrates . . . to the satisfaction of the Administrator, that a greater stack height is necessary" to ensure against excessive pollutant concentrations due to downwash.

¹⁰ *Kennecott Copper Corp. v. Train*, 526 F.2d 1149 (9th Cir. 1975), *cert. denied*, 425 U.S. 935 (1976); *Big Rivers Electric Corp. v. EPA*, 523 F.2d 16 (6th Cir. 1975), *cert. denied*, 425 U.S. 934 (1976). One § 110 state plan that allowed use of "tall stacks" had been approved by EPA prior to adoption of its 1973 policy. This approval was reversed in 1974 by the Fifth Circuit. *NRDC v. EPA*, 489 F.2d 390 (5th Cir. 1974), *rev'd on other issues sub nom. Train v. NRDC*, 421 U.S. 60 (1975). See also *NRDC v. EPA*, 529 F.2d 755 (5th Cir. 1976) (upholding EPA's subsequent approval of that state plan after deletion of the dispersion technique provisions).

¹¹ In 1976, EPA had issued a revised stack height policy that differed in certain respects from the 1973 proposed rule. 41 Fed. Reg. 7450 (1976). The 1976 policy, however, was superseded by the 1977 Amendments to the Act before it was ever applied in a specific case.

II. EPA'S FIRST § 123 RULEMAKING

In January 1979, EPA proposed rules under § 123.¹² While the plain language of the statute allowed EPA to adopt a rule giving sources credit to the 2.5H formula unless a greater height was shown to be needed to avoid downwash problems, EPA exercised its rulemaking discretion to adopt a generally applicable formula that was more stringent than the statutory 2.5H formula. The proposed GEP formula, the " $H + 1.5L$ " formula, would be applicable to all existing and new stacks.¹³ In accordance with the statute, case-by-case demonstrations would be required only for sources that sought GEP credit *above* this formula height.

Going further beyond the statutory requirements, the 1979 proposal would have given the permitting authority (EPA or the state) discretion to require demonstrations to justify credits *up to* formula height on a case-by-case basis, in certain limited circumstances.¹⁴ In 1980, EPA announced a "policy" that went further than the 1979 proposal, and *required* (as opposed to authorized) demonstrations in support of the GEP formula in one instance

¹² 44 Fed. Reg. 2608 (1979).

¹³ *Id.* at 2614. The formula establishes GEP stack height as the height of the source (H) plus one and one-half times the lesser of the height or width of the source (1.5L). Of course, if the width is greater than the height, this refined formula produces a result identical to the traditional 2.5H engineering formula.

¹⁴ For example, for sources that sought in the future to replace existing short stacks with GEP formula stacks, EPA or a state could require a demonstration of a downwash-related air quality problem with the existing stack before the source could use the GEP formula to establish credit for the new stack. *Id.* In addition, the permitting authority could in the future require, on a case-by-case basis, demonstrations in support of the GEP formula. *Id.*

Under the 1973 proposal, there was no provision authorizing EPA or the states to require a demonstration for credit up to formula height. Rather, automatic credit to GEP formula height was available. As a result, these demonstration requirements would apply prospectively.

—when a source proposed in the future to replace a short stack with a new, taller stack (i.e., a “replacement stack”) and wanted credit up to formula height.¹⁵ Under both the 1979 proposal and the 1980 policy, however, the GEP formula would have been used to establish stack height credit in all cases except in the limited circumstances identified by EPA.

After reproposal of its rules in 1981 to reflect changes in the Agency’s thinking as to the requirements of § 123, EPA in 1982 announced, for the first time, after benefit of notice and comment rulemaking, the Agency’s interpretation of § 123 of the Act.¹⁶ In the final rules promulgated in 1982, EPA retained the “ $H + 1.5L$ ” GEP formula applicable to all existing and new stacks, and the requirement for demonstrations to justify above-formula height GEP credit. However, the final rule (like the 1981 repropose rule, and unlike the 1979 proposal and 1980 replacement stack policy) provided for automatic credit up to GEP formula height. Under the 1982 final rule, the $H + 1.5L$ formula would apply prospectively from the date of the 1979 proposal, and sources with stacks in existence prior to that date could use the traditional $2.5H$ formula instead of the refined $H + 1.5L$ formula.¹⁷

As a result of these changes, the 1982 final rules adopted a simple and straightforward approach to determining GEP stack height credit. They provided for (1) the statutory GEP formula ($2.5H$) for stacks built be-

¹⁵ 45 Fed. Reg. 42279, 42282 (1980).

¹⁶ 46 Fed. Reg. 49814 (1981); 47 Fed. Reg. 5864 (1982).

¹⁷ 47 Fed. Reg. at 5866, 5868 (1982). Moreover, the 1982 final rules did not include language that had been in the 1979 proposal giving the permitting authority discretion to require demonstrations in support of the GEP formula in specific cases. *Id.* at 5868. As a practical matter, however, making explicit that states have discretion to require GEP formula demonstrations in specific cases would add nothing to state authority, since states can always require such demonstrations under § 116 of the Act.

fore 1979, (2) a general GEP formula ($H + 1.5L$) for stacks built in 1979 or later, and (3) demonstration requirements for sources seeking above-formula height GEP credit.

III. THE 1983 D.C. CIRCUIT DECISION

Two environmental groups (NRDC and Sierra Club) challenged, *inter alia*, two aspects of the 1982 GEP formula rules. First, these groups maintained (based on the 1980 "policy")¹⁸ that EPA could not allow automatic GEP formula credit for sources building replacement stacks *in the future* without requiring a demonstration identical to that which sources seeking credit above GEP formula height must undertake. Second, they maintained that EPA should have made explicit that the permitting authority retains discretion to require demonstrations in support of the GEP formula.¹⁹ Third, these groups argued that EPA could not allow use of the traditional 2.5H formula (as opposed to the $H + 1.5L$ formula) for any source with stacks in existence prior to the 1979 proposal.

In response to NRDC's arguments for requiring GEP demonstrations in certain instances for sources not seeking greater than formula height credit, the D.C. Circuit, in a decision pre-dating this Court's opinion in *Chevron U.S.A., Inc. v. NRDC*,²⁰ agreed with EPA that "the House committee, and perhaps the Congress generally, probably had in mind a system of determining GEP stack height involving a generalized formula applicable to all sources except those seeking *greater* [than formula] height."²¹ However, based upon conflicting and

¹⁸ See *supra* note 15 and accompanying text.

¹⁹ See *supra* note 17.

²⁰ 467 U.S. 837 (1984) ("*Chevron*").

²¹ *Sierra Club v. EPA*, 719 F.2d 436, 457 (D.C. Cir. 1983), *cert. denied sub nom. Alabama Power Co. v. Sierra Club*, 468 U.S. 1204 (1984) (emphasis added).

somewhat unreliable legislative history,²² the court rejected EPA's interpretation of the Act as authorizing automatic GEP formula height credit for all stacks and requiring demonstrations only for above-formula height credit. Instead, the court imposed an interpretation that required *future* stack height increases to undergo case-specific demonstrations to justify credit up to GEP formula height.²³

The court therefore remanded the GEP formula rules. On remand, EPA was directed to consider whether to supplement the GEP formula rules with demonstration requirements similar to those contained in the January 1979 proposal and the 1980 "policy."²⁴

Regarding NRDC's challenge to the decision to apply the $H + 1.5L$ formula prospectively, by contrast, the court held that, regardless of the existence of a more refined formula (the $H + 1.5L$ formula), EPA was justified in allowing all sources with stacks in existence prior to the 1979 proposal (i.e., original and replacement stacks) to use the less accurate, traditional 2.5H formula to determine GEP height.²⁵ The court found, however, that EPA should have restricted use of the 2.5H formula to those sources that had actually relied upon it in the past, and therefore remanded the rule for EPA

²² See *id.* at 458-59 (referring to a "conference report" appearing at 123 CONG. REC. 27,070 (1977), which was not the Conference Report of the House and Senate but instead was a statement inserted into the *Congressional Record* by Rep. Rogers during debate on the officially published Conference Report; cf. Conference Report, H.R. Rep. No. 564, 95th Cong., 1st Sess. 143-44 (1977)). Thus, the court found that the legislative history "disclose[d] sharply conflicting signals" and stated that "Congress [probably] thought that traditional engineering practice [i.e., the 2.5H formula]" was acceptable. Nevertheless, it resolved the "conflicting signals" itself rather than deferring to EPA's resolution of this conflict. 719 F.2d at 448, 450.

²³ See *id.* at 459-60.

²⁴ *Id.*

²⁵ *Id.* at 467-68.

"to reformulate its rule to take actual reliance into account."²⁶

IV. EPA'S SECOND § 123 RULEMAKING

In response to the 1983 D.C. Circuit decision, EPA provided for GEP formula demonstrations in the limited circumstances identified by the court. Thus, EPA required, as petitioners NRDC and Sierra Club urged in the 1982-1983 litigation, that sources replacing short stacks after the remand conduct case-specific demonstrations in order to justify use of GEP formula credit for the new stack.²⁷ Consistent with the Sierra Club and NRDC challenge and the *Sierra Club* decision,²⁸ this rule was written to apply to replacement stacks built after October 11, 1983, the date of the D.C. Circuit decision.²⁹ EPA also reinserted language similar to that in the 1979 proposal explicitly authorizing EPA or states to require case-specific GEP formula demonstrations for any stack built after the January 1979 proposal.³⁰

Finally, EPA amended the 2.5H rule by requiring, pursuant to the *Sierra Club* decision, that the source provide evidence that the 2.5H formula had been relied upon in establishing an emission limitation before a source could take advantage of that formula.³¹

²⁶ *Id.* at 468.

²⁷ This change was made not in the GEP formula rule itself, but rather in the definition of "excessive concentrations." See 50 Fed. Reg. 27892, 27906-07, § 51.1(kk)(2) (1985), App. 132a.

²⁸ That is, Sierra Club and NRDC's argument was limited to future replacement stacks. Brief of Sierra Club and NRDC in *Sierra Club* (D.C. Cir. Nos. 82-1384, *et al.*) at 27-30 (October 25, 1982); 719 F.2d at 459-60.

²⁹ Sources with short stacks replaced before this date could continue to rely on automatic credit to the GEP formula (either the 2.5H or the H + 1.5L formula, as appropriate), as they had done in the past.

³⁰ 50 Fed. Reg. at 27906-07, § 51.1(ii)(2)(ii), App. 130a, 27907, § 51.1(kk)(3), App. 132a.

³¹ *Id.* at 27906, § 51.1(ii)(2)(i), App. 130a.

Having made the limited refinements to the GEP formula rules suggested by *Sierra Club*, EPA otherwise maintained its basic approach to § 123, providing for use of a general GEP formula that would determine stack height credit in the majority of cases.³² Thus, most sources could still base GEP stack height credit on the general " $H + 1.5L$ " or " $2.5H$ " formulae, and demonstrations would be required as a general matter only when a source sought above-formula height credit or proposed to build a new replacement stack in the future.

V. THE 1988 D.C. CIRCUIT DECISION

As they had in 1982, NRDC and *Sierra Club*, joined by eight northeastern states³³ and the Environmental Defense Fund (hereinafter referred to collectively as "NRDC"), challenged, *inter alia*, the final GEP formula rules. In contrast to the arguments in 1982, which EPA addressed in the 1985 remand rulemaking,³⁴ NRDC raised much broader challenges to the 1985 GEP formula rules.

First, NRDC challenged EPA's decision to allow replacement stacks built before October 11, 1983, to use the GEP formula, arguing that EPA improperly failed to extend to all replacement stacks built after 1970 the demonstration rule that EPA adopted for post-October 11, 1983 replacement stacks. Second, NRDC challenged EPA's decision to allow original stacks built before January 1979 to use the GEP formula, arguing that EPA should have extended the demonstration rule for post-January 1979 stacks to all original stacks built after 1970. Finally, NRDC attacked not only the new reliance

³² See *id.* at 27897-98, App. 94a-95a. In response to the court's remand, EPA also added information to the rulemaking record showing that the GEP formula was needed to protect against specific health and welfare concerns. *Id.* at 27896-97, App. 89a-94a.

³³ Four of those states had intervened on behalf of NRDC and *Sierra Club* in the 1982-1983 litigation.

³⁴ See *supra* pp. 11-12.

provision in the 2.5H rule, but also the 2.5H rule that had previously been upheld in *Sierra Club* for those who relied on the rule. In effect, therefore, by calling for universal demonstration requirements, NRDC challenged EPA's implementation of § 123 through a general GEP formula.

The lower court found that nothing in its earlier decision "required EPA to reevaluate the accuracy of the . . . formula" that the Agency had adopted as the basic tool for implementing § 123,³⁵ and that "consideration of deficiencies in the formula is barred by *res judicata*."³⁶ However, the court also found that if "the demonstration procedures chosen by EPA [in response to *Sierra Club* were] . . . insufficient to fulfill the statutory purposes," then it could require EPA to rewrite those demonstration requirements in a way that limited use of a GEP formula.³⁷

Given this approach, the court examined the $H + 1.5L$ GEP formula rule applicable to stacks built from August 1970 to October 1983. The court found EPA's rule lacking for failure to apply the post-October 1983 case-by-case demonstration requirements to replacement stacks built before this date, and for failure to apply the post-January 1979 demonstration rule to original stacks built before that date.³⁸ The court then examined the 2.5H GEP formula rule applicable to replacement stacks built between August 1970 and January 1979 in reliance on

³⁵ 838 F.2d at 1239, App. 26a.

³⁶ *Id.* The court, however, rejected in a footnote EPA's efforts to tie the formula to specific health and welfare effects. *See id.* at 1244 n.16, App. 36a. According to the Court, EPA never set out "thoroughly to validate its $H + 1.5L$ formula." *Id.* at 1244, App. 36a. Moreover, as discussed below, the court rejected outright the use of the 2.5H formula for pre-January 1979 replacement stacks that had relied on this formula. *Id.* at 1246, App. 40a.

³⁷ *Id.* at 1239, App. 26a.

³⁸ *Id.* at 1244-46, 1248, App. 36a-40a, 44a.

that formula.³⁹ Even though the D.C. Circuit had previously accepted this GEP formula rule where reliance could be shown, the court extended its holding regarding the need for GEP demonstrations to this category of stacks as well.⁴⁰

Accordingly, in spite of EPA's apparently broad authority to implement § 123 through a generally applicable GEP formula, the D.C. Circuit's earlier acceptance of a formula approach,⁴¹ and NRDC's failure to argue for retroactive demonstration requirements in the earlier litigation,⁴² the court found that the Agency had improperly "grandfathered" replacement stacks subject to the $H + 1.5L$ and 2.5H formulae and original stacks subject to the $H + 1.5L$ formula from GEP demonstration requirements and remanded these rules to EPA.⁴³

In place of the simple GEP formula scheme that had been central to EPA's program, the court described a more complex approach. It identified what it believed were six different regulatory policies that it claimed EPA had applied in the period between 1970 and 1983,⁴⁴ and

³⁹ *Id.* at 1244-46, App. 36a-40a.

⁴⁰ *Id.* However, the court affirmed the 2.5H rule, including the reliance provision, as applied to a smaller category of sources—pre-1979 original stacks at new sources. *Id.* at 1246-48, App. 41a-44a.

Curiously, the purpose of the 2.5H formula rule was to allow sources that had relied upon the less accurate, traditional GEP formula to avoid having to apply a "refined" formula that could result in a different stack height credit. By definition, therefore, the 2.5H formula was not as accurate as the refined formula or as credit defined through case-by-case demonstrations. Nevertheless, this GEP formula rule was previously found by the D.C. Circuit to satisfy § 123. 719 F.2d at 467-68.

⁴¹ For example, the 2.5H rule applicable to pre-1979 stacks had been affirmed in all but one respect by the D.C. Circuit in 1983. *See supra* pp. 10-11.

⁴² *See supra* p. 9.

⁴³ 838 F.2d at 1244-46, 1248, App. 36a-40a, 44a.

⁴⁴ *Id.* at 1245, App. 38a-39a.

suggested that if EPA chose not to apply demonstration requirements to pre-October 11, 1983 replacement stacks and pre-January 1979 original stacks, EPA would need to tailor its GEP formula grandfathering rules as closely as possible to these allegedly varying regulatory policies.⁴⁵

By extending GEP formula demonstration requirements to sources seeking only GEP formula credit, the D.C. Circuit has pushed the pre-*Chevron Sierra Club* decision to its extreme. Section 123, on its face, gives EPA broad discretion to proceed by GEP formula, and requires use of demonstrations only for above-GEP formula credit. The *Sierra Club* court, based on its own interpretation of the statute, found that EPA must also adopt certain limited demonstration requirements to justify GEP credit up to formula height. In the instant case, the lower court has required that the *Sierra Club* GEP demonstration approach be extended to virtually all sources, in large measure writing out of the statute EPA's authority to adopt a generally applicable GEP formula.⁴⁶

⁴⁵ *Id.* at 1246, App. 40a.

⁴⁶ EPA's GEP formula is based on information showing that the formula is needed to protect against increases in downwash-induced concentrations of forty percent or more, which increased concentrations have adverse health and welfare implications. 50 Fed. Reg. at 27896-898 (1985), App. 93a-95a. While the court suggested in passing that "EPA has the alternative of adopting a formula clearly valid enough to dispense with demonstrations altogether," 838 F.2d at 1246, App. 40a, the court rejected EPA's attempt to support the $H + 1.5L$ formula as not "thoroughly . . . validate[d]," but gave EPA no guidance as to what the court might view as an acceptable "validat[ion]." See *id.* at 1244 n.16, App. 36a; *supra* note —. To the extent the court's statement regarding the GEP formula is read to suggest that EPA must "thoroughly . . . validate" the formula in terms of an absolute pollutant concentration that creates a health or welfare concern, see 838 F.2d at 1244 n.16, App. 36a, no general formula will be possible, since absolute concentrations vary with individual plant emission rates. In any

The D.C. Circuit's most recent decision brings regulation of stack height credit to a level of complexity that is remarkable even in the area of environmental regulation. On remand, EPA must consider different GEP rules for new sources and existing sources; for replacement stacks and original stacks; for pre-January 1979 stacks, pre-October 11, 1983 stacks; and post-October 11, 1983 stacks; and for various combinations of these categories of stacks and facilities. For one of these categories of stacks—pre-October 11, 1983 replacement stacks—the court's decision suggests that EPA develop up to six GEP grandfathering rules that apply based upon when the stack was built. Case-specific demonstrations to justify credits up to formula height are required for all non-grandfathered stacks.

The regulatory program mandated by the D.C. Circuit is a far cry from the statutory language which authorizes EPA to provide for stack height credit up to GEP formula height and requires demonstrations only to justify above-formula height GEP credit.

VI. REQUESTS FOR REHEARING

On March 7, 1988, EPA filed a timely Petition for Rehearing on the issues presented in this petition. On the same date, Respondent-Intervenors Alabama Power Co., *et al.* filed a timely Petition for Rehearing and Suggestion for Rehearing En Banc, on these issues. The D.C. Circuit denied these Petitions on April 13, 1988. App. 65a-68a.

REASONS FOR GRANTING THE PETITION

In 1977, Congress added § 123 to the Clean Air Act. EPA has consistently interpreted § 123 to be a relatively

event, the court's detailed discussion of demonstration and grandfathering rules and passing rejection of the GEP formula approach suggests, as a practical matter, that the Agency will proceed on remand, in the court's view, to adopt the case-by-case demonstration and grandfathering scheme described in the lower court's opinion.

simple statutory provision requiring EPA to adopt rules governing "good engineering practice" ("GEP") credits above the statutory GEP formula height (2.5 times source height) and giving EPA discretion to adopt a generally applicable formula that was more stringent than the statutory 2.5H formula. In other words, EPA interpreted the statute as only requiring case-by-case demonstrations where the statute explicitly called for them—i.e., where a source wants stack height credit above formula height.

In light of its interpretation of § 123 as only requiring case-by-case demonstrations above formula height, EPA sought to implement the § 123 program by means of a generally applicable GEP formula beginning with its first proposal in 1979. With a few exceptions mandated by the D.C. Circuit's 1983 decision, this approach was maintained in the 1985 final rules.

Despite EPA's long-standing interpretation of the Act, the D.C. Circuit has substituted its interpretation of § 123 for that of EPA. As a result, the D.C. Circuit has required EPA to implement § 123 *not* by means of a generally applicable formula, but rather by means of case-specific demonstrations for most sources subject to § 123, unless the source qualifies under one of potentially numerous, detailed GEP "grandfathering" rules that differ depending on when a stack was built and what type of stack it is (original or replacement).

As a result of the D.C. Circuit's intervention, § 123 has been transformed into one of the most complex Clean Air Act regulatory programs. Instead of final § 123 rules being promulgated within six months of § 123's enactment, as Congress instructed in 1977 in the expectation that § 123 would be simple and straightforward to implement, ten years have passed and no end to this rule-making is in sight.

The complexity introduced into the § 123 program by the D.C. Circuit is a product of that court's failure to

respect basic principles of law that delineate the responsibilities of federal courts and agencies. First, the D.C. Circuit has failed to give any deference to EPA's interpretation of § 123 of the Act to allow the Agency to proceed by general GEP formula. Rather, the court has extended its pre-*Chevron Sierra Club* decision to replace the Agency's straightforward interpretation of the statute with one that calls for multiple GEP grandfathering rules and case-by-case demonstrations for those not "grandfathered." *Chevron* governs the D.C. Circuit's review of EPA's implementation of § 123 and should have led that court to uphold the Agency's GEP formula rules.

Second, the D.C. Circuit has ignored the long-standing doctrines of law of the case and *res judicata* in revisiting issues that were previously raised and resolved (or that could have been raised) in *Sierra Club*. Together with the doctrine of deference, the doctrines of law of the case and *res judicata* should be applied on review of agency remand proceedings to limit judicial intervention in agency decisionmaking. Failure to respect these doctrines leads, as in the instant case, to interference with Congress' delegation of rulemaking authority, and to conflicting signals for both regulatory agencies and regulated parties.

Because of the D.C. Circuit's actions, Petitioners urge this Court to grant certiorari in this case to help bring to a close ten years of rulemaking and litigation over a simple and straightforward statutory provision.

**I. THE D.C. CIRCUIT FAILED TO APPLY THE
CHEVRON DOCTRINE AND TO GIVE DEFER-
ENCE TO EPA'S REASONABLE INTERPRETA-
TION OF § 123.**

Section 123 of the Clean Air Act requires the EPA Administrator to implement the GEP stack height directive in a manner that will "insure" that unacceptable downwash is avoided. Other than this statutory defini-

tion, and the restriction that GEP height may not exceed the height provided by the traditional 2.5H GEP formula in the absence of a case-specific demonstration, the Administrator has complete discretion to implement the GEP directive by general rule.

The Conference Report to § 123 is more explicit than the statute regarding the meaning of GEP. The Report states that GEP is "defined at . . . $2\frac{1}{2}$ times the height of the source," unless a source demonstrates that a stack height greater than 2.5H is necessary to insure against excessive pollutant concentrations resulting from aerodynamic downwash.⁴⁷

Based on this broad grant of authority and the Conference Report's discussion of GEP, the Administrator in 1982 adopted a straightforward interpretation of the statute to authorize establishment of a general GEP formula, and development of demonstration requirements for *above-formula* height credit.⁴⁸ While the D.C. Circuit in 1983 recognized that Congress "probably had in mind" implementation of the GEP directive in terms of a generally applicable formula that reflected engineering practice,⁴⁹ it nevertheless directed the Agency to adopt on

⁴⁷ H.R. Rep. No. 564, 95th Cong., 1st Sess. 143 (1977). See also H.R. Rep. No. 294, 95th Cong., 1st Sess. 93 (1977) ("A stack height value produced by reference to this historical relationship [i.e., 2.5H] is referred to as 'good engineering practice' stack height . . .").

⁴⁸ While the statute, on its face, only requires demonstrations to justify credits *above* 2.5H formula height, EPA exercised its discretion to adopt a more stringent GEP formula (the $H + 1.5L$ rule). The Administrator in 1982 promulgated the refined GEP formula applicable to stacks constructed after issuance of the 1979 proposed rules, and provided that the traditional 2.5H GEP formula would be applicable to stacks constructed before the 1979 proposal. See *supra* pp. 7-9.

⁴⁹ See *supra* pp. 9-10. Use of a "good engineering practice" standard to reflect an engineering rule of thumb is not unusual. See *Motor Vehicle Manufacturers Ass'n v. Ruckelshaus*, 719 F.2d 1159,

remand a scheme that anticipated some demonstrations to justify credits *up to* formula height. The court in 1983 otherwise left the GEP formula as the centerpiece for § 123 implementation, upholding the use of the 2.5H formula for most pre-1979 stacks and the $H + 1.5L$ formula for most other stacks.⁵⁰

In its most recent decision, the D.C. Circuit has substantially expanded its 1983 decision and has thrown into question whether § 123 can ever be implemented through a straightforward GEP formula. The court's clearly preferred alternative on remand, and perhaps the only realistic alternative,⁵¹ appears to be creation of numerous distinct GEP grandfathering rules for different categories of stacks with a requirement for case-by-case GEP demonstrations if the source cannot qualify for grandfathering.⁵²

In *Chevron*, decided after the 1983 D.C. Circuit decision but well before the court's latest decision, this Court stressed that if the agency's choice

represents a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute, [a court] . . . should not disturb it unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned.⁵³

In other words, if Congress "did not actually have an intent regarding" the precise issue resolved by the Agency, the question for the court is whether the agency's

1167 (D.C. Cir. 1983) (EPA's interpretation of "GEP" in the context of the mobile source provisions of the Act to reflect traditional engineering practice was upheld.).

⁵⁰ See *supra* pp. 10-11.

⁵¹ See *supra* note 46.

⁵² See *supra* pp. 14-16.

⁵³ 467 U.S. at 845, quoting *United States v. Shimer*, 367 U.S. 374, 383 (1961).

resolution of the issue is "reasonable."⁵⁴ The question for the court is *not* "whether in its view" the agency's resolution of the issue is "inappropriate."⁵⁵

In this case, the D.C. Circuit has once again imposed its interpretation of this statutory provision on the Agency, an interpretation an earlier panel had based upon admittedly ambiguous legislative history.⁵⁶ In this case, the lower court has extended its earlier holding in a manner that virtually precludes use of a general GEP formula.⁵⁷ The lower court has either lost sight of its proper rule in reviewing an agency's regulations, or has *sub silentio* decided that *Chevron* does not apply in the circumstances of this case.⁵⁸ That the lower court originally interpreted this statute for the Agency prior to *Chevron* should not insulate that court in this case from the standards enunciated in *Chevron* regarding the proper rules of federal courts and agencies in interpreting a statute granting the agency broad rulemaking powers.

As a result of the lower court's substitution of its view of the statute for that of EPA, a Clean Air Act

⁵⁴ 467 U.S. at 845.

⁵⁵ *Id.*

⁵⁶ See *supra* note 22.

⁵⁷ See *supra* note 46.

⁵⁸ Indeed, in the D.C. Circuit and other circuits, some question has been raised as to the scope and applicability of *Chevron*. Thus, the D.C. Circuit has read this Court's opinion in *INS v. Cardoza-Fonseca*, 107 S. Ct. 1207 (1987), to hold that the *Chevron* does not apply to "questions of pure statutory interpretation," and that courts have free reign to address such questions of interpretation. See, e.g., *Union of Concerned Scientists v. U.S. Nuclear Regulatory Commission*, 824 F.2d 108, 113 (D.C. Cir. 1987); *Int'l Union v. Brock*, 816 F.2d 761, 764-65 (D.C. Cir. 1987); *City of Farmington v. FERC*, 820 F.2d 1308, 1317 (D.C. Cir. 1987) (Wald, dissenting). The Ninth Circuit has also suggested that federal courts have more latitude on issues of statutory interpretation under *Cardoza-Fonseca* than under *Chevron*. See *Ruiz v. INS*, 813 F.2d 283, 288 (9th Cir. 1987), *aff'd en banc*, 838 F.2d 1020 (9th Cir. 1988).

program which Congress perceived to be simple and straightforward has been transformed into one of the most complex regulatory programs under the Act. The D.C. Circuit's intervention into the domain of EPA is unwarranted and, since *Chevron* was issued, unprecedented. This Court should hear this case to clarify for the D.C. Circuit, and for the circuits generally, the proper role of federal courts in reviewing agency interpretations of their enabling statutes.

II. CERTIORARI SHOULD BE GRANTED TO CLARIFY THE APPLICATION OF THE DOCTRINES OF LAW OF THE CASE AND RES JUDICATA TO JUDICIAL REVIEW OF AGENCY REMAND PROCEEDINGS.

In order to ensure efficient judicial review and fairness to litigants, this Court has announced several doctrines of law to guide lower federal courts in cases characterized by repetitive litigation. One of these long-standing doctrines, known as the law of the case, provides that

[w]hile power rests in a federal court that passes an order or decision to change its position on a subsequent review in the same cause, orderly judicial action, except in unusual circumstances, requires it to refuse to permit the relitigation of matters or issues previously determined on a former review.⁵⁹

A related doctrine announced by this Court, the doctrine of *res judicata*, provides that

a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action.⁶⁰

⁵⁹ Insurance Group Committee v. Denver & Rio Grande Western Railroad Co., 329 U.S. 607, 612 (1947) (footnote omitted); *accord*, Messinger v. Anderson, 225 U.S. 436, 444 (1912).

⁶⁰ Allen v. McCurry, 449 U.S. 90, 94 (1980).

Except for a remand solely for EPA to include a reliance requirement in the 2.5H GEP formula rule, the D.C. Circuit in 1983 upheld that rule.⁶¹ By contrast, upon review in 1988 of the identical rule to which a reliance requirement had been added, the D.C. Circuit remanded the rule as it applied to a large number of facilities (i.e., sources with replacement stacks), even though the court sustained the new reliance provision.⁶²

The lower court in this case did recognize that the doctrine of *res judicata* was applicable in regard to certain issues raised by NRDC.⁶³ However, concerning the 2.5H formula issue, the court simply failed to consider this doctrine, even though Respondent-Intervenors had argued that the doctrine was applicable.⁶⁴ As a result, EPA must on remand reconsider issues that it thought had been settled in *Sierra Club* five years ago.

Since any challenge to the 2.5H formula as it applies to replacement stacks could have been raised, and was ripe for review, in the 1983 litigation, the lower court should have refused to consider NRDC's untimely 1988 challenge under the doctrine of *res judicata*. Moreover, since the D.C. Circuit in 1983 upheld the 2.5H rule applicable to *all* pre-January 1979 stacks against a general

⁶¹ See *supra* pp. 10-11.

⁶² See 838 F.2d at 1244-48, App. 36a-44a. EPA had pointed out to the court that its review should be limited to the reliance provision, but the court did not understand EPA's argument. *Id.* at 1244, App. 36a. Although EPA explained the point again in a petition for rehearing, the court without explanation refused to reconsider its opinion. App. 65a-66a.

⁶³ See, e.g., 838 F.2d at 1252, App. 52a. On one issue, the court decided that the doctrine did not apply. *Id.* at 1235, App. 17a.

⁶⁴ This issue was whether NRDC, having in 1983 successfully challenged EPA's refusal to require case-specific demonstrations for *new* replacement stacks, could in this case challenge EPA's continuing refusal to require demonstrations for *existing* replacement stacks.

NRDC attack, with the exception of requiring a reliance showing, the court should have refused to hear NRDC's later general challenge to that rule under the doctrine of law of the case.

Given the confusion in the D.C. Circuit as to the applicability of these doctrines, and the importance of the D.C. Circuit in reviewing actions of administrative agencies, it is important that this Court grant certiorari to clarify application of the doctrines of law of the case and *res judicata* on judicial review of remand rulemaking.

III. THE DECISION OF THE D.C. CIRCUIT WILL HAVE A SUBSTANTIAL ADVERSE IMPACT ON ADMINISTRATION OF THE CLEAN AIR ACT.

As discussed previously, EPA has consistently interpreted § 123 to authorize implementation by means of a generally applicable GEP formula.⁶⁵ In the 1982-83 D.C. Circuit litigation, this approach was not generally challenged, except as applied to sources that in the future sought to replace existing stacks below formula height with new replacement stacks.⁶⁶

In its latest opinion, the D.C. Circuit has rejected EPA's straightforward GEP formula approach in favor of the court's own approach that would subject sources with pre-1979 original stacks and pre-October 1983 replacement stacks (which together constitute the majority of sources now subject to § 123) to case-by-case GEP formula demonstrations when they do not qualify under a complex set of GEP grandfathering rules suggested

⁶⁵ See *supra* pp. 7-9, 11-12.

⁶⁶ See 719 F.2d at 459-60. For these sources, the court suggested, as petitioners Sierra Club and NRDC had urged, that demonstrations to show a downwash problem should be required before the GEP formula could be used. EPA added such a requirement in the 1985 final rules, which the court in this proceeding affirmed. 838 F.2d at 1239-40, App. 26a-28a.

by the court. The implications of this decision for EPA's administration of the Act are significant.

At the outset, EPA must divert scarce budgetary and manpower resources away from other higher priority Clean Air Act projects to conduct a remand rulemaking addressing issues that the Agency thought were settled by the D.C. Circuit five years ago. In that rulemaking, because of the court's interpretation of § 123, EPA will need to develop revised § 123 rules that require case-by-case demonstrations of GEP height and establish a multi-layer grandfathering scheme with different GEP rules applicable to different sources, depending upon the type and age of their stack.

Adoption of a case-by-case demonstration requirement for GEP formula credit with a multi-layer GEP grandfathering scheme will vastly complicate implementation of § 123. Indeed, if case-specific demonstrations were required for all post-1970 replacement stacks, implementation of the program could span another decade due to the limited number of wind tunnel facilities capable of performing such demonstrations. Under the approach demanded by the D.C. Circuit, states will be forced to divert their own scarce resources to revise their § 110 plans for a third time, in order to carry out the court's latest view of how § 123 should be implemented.

Finally, costs of the revised § 123 program could be enormous for regulated industries. These industries since 1973 have made investments and corporate plans in reliance upon EPA statements that dispersion credit associated with $2.5H$ (or $H + 1.5L$) GEP formula stack height is acceptable. As a result of the D.C. Circuit's decision, these industries could be forced to conduct demonstrations for their sources, collectively costing millions of dollars, and to forego past investments and change corporate plans, at a cost of many more millions of dollars. Secondary costs to society, such as unemployment

of coal miners and increased cost of electricity and consumer products, will also be significant.

In short, a provision that Congress in 1977 intended only to affirm EPA's implementation of the Act since 1973 has been transformed by the D.C. Circuit into one of the most complex and expensive programs under the Act. This Court should remind the D.C. Circuit of its proper role in these disputes, and prevent that court from imposing its view of § 123 upon the Agency.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari to the United States Court of Appeals for the D.C. Circuit should be granted.

Respectfully submitted,

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SUPPLEMENTAL APPENDIX

SA-1

SUPPLEMENTAL APPENDIX

PARENT COMPANIES, SUBSIDIARIES, AND
AFFILIATES OF INDIVIDUAL
ELECTRIC UTILITIES

Alabama Power Company
(subsidiary of The Southern Company)

subsidiaries:

Alabama Property Company
Columbia Fuels, Inc.

affiliate:

Southern Electric Generating Company

Appalachian Power Company
(controlled by American Electric Power Company, Inc.)

subsidiaries:

Central Appalachian Coal Company
Central Coal Company
Central Operating Company
Kanawha Valley Power Company
Southern Appalachian Coal Company
West Virginia Power Company
Cedar Coal Company

Baltimore Gas and Electric Company

subsidiaries:

Safe Harbor Water Power Corp.
Constellation Holdings, Inc.

subsidiaries:

Constellation Biogas, Inc.
Constellation Investments, Inc.
Constellation Properties, Inc.

SA-2

Boston Edison Company

Carolina Power & Light Company

subsidiaries:

Capitan Corporation
Carolina Power & Light Finance, N.V.

affiliate:

Carolinas-Virginia Nuclear Power Associates,
Inc.

Central and South West Corporation

subsidiaries:

Central Power and Light Company
Public Service Company of Oklahoma

subsidiary:

Ash Creek Mining Company
Transok, Inc.
Southwestern Electric Power Company
West Texas Utilities Company
Central and South West Services, Inc.
CSW Financial, Inc.
CSW Energy, Inc.
CSW Leasing, Inc.
CSW Credit, Inc.

Central Hudson Gas and Electric Corporation

subsidiaries:

Phoenix Development Company, Inc.
Greene Point Development Corporation
Central Hudson Enterprises Corp.
CH Resources, Inc.
CH Cogeneration, Inc.

SA-3

Central Illinois Light Company
(a subsidiary of CILCORP, Inc.)

subsidiaries:

CILCO Exploration and Dev. Co.
CILCO Energy Corporation

Central Illinois Public Service Company

affiliate:

Electric Energy, Inc.

The Cincinnati Gas and Electric Company

subsidiaries:

Union Light, Heat and Power Co.
West Harrison Gas & Electric Co.
Miami Power Corp.
Lawrenceburg Gas Co.
Lawrenceburg Gas Transmission Corp.
Tri-State Improvement Co.
YGK, Inc.

Cleveland Electric Illuminating Company
(controlled by Centerior Energy Corporation)

subsidiaries:

CCO Company
Ceico Company
Dynamic Energy Ventures

Columbus Southern Power Company
(controlled by American Electric Power Company, Inc.)

subsidiaries:

- Colomet, Inc.
- Simco, Inc.
Conesville Coal Preparation Co.

Commonwealth Edison Company

subsidiaries:

Commonwealth Edison Co. of Indiana, Inc.
Chicago and Illinois Midland Railway Co.

SA-4

Cotter Corp.
Commonwealth Research Corp.
Edison Development Canada, Inc.
Edison Development Co.
Concomber, Ltd.

Consolidated Edison Company of New York, Inc.

Consumers Power Company

subsidiaries:

Michigan Gas Storage Company
Northern Michigan Exploration Company
Selective Collection Services, Inc.
Utility Systems, Inc.
Huron Hydrocarbons, Inc.

The Dayton Power and Light Company
(controlled by DPL, Inc.)

subsidiaries:

DP&L Community Urban Redevelopment Corp.
Miami Valley Development Company

Delmarva Power & Light Company

subsidiaries:

Delmarva Industries, Inc.
Delmarva Services Company
Delmarva Capital Investments, Inc.

subsidiaries:

DCI I, Inc.
DCI II, Inc.
Delmarva Capital Technology, Inc.
Delmarva Capitol Realty Company

The Detroit Edison Company

subsidiaries:

Edison Illuminating Company
Midwest Energy Resources Company

SA-5

Washtenaw Energy Corp,
St. Clair Energy Corp.
SYNDECO, Inc.

Duke Power Company

subsidiaries:

Mill-Power Supply Co.
Crescent Land & Timber Corp.
Wateree Power Co.*
Catawba Manufacturing and Electric Power
Co.*
Western Carolina Power Co.*
Caldwell Power Co.*
Southern Power Co.*
Greenville Gas and Electric Light
and Power Co.*
Church Street Capital Corp.
Duke Engineering and Services

Florida Power Corporation
(controlled by Florida Progress Corporation)

Florida Power & Light Company
(wholly-owned subsidiary of FPL Group, Inc.)

subsidiaries:

Land Resources Investment Company
FPL QualTec, Inc.
Alandco, Inc.

Georgia Power Company
(subsidiary of The Southern Company)

subsidiary:

Piedmont Forrest Co.

* Inactive

SA-6

affiliate:

Southern Electric Generating Company

Gulf Power Company

(subsidiary of The Southern Company)

Illinois Power Company

subsidiaries:

IP Inc.

IPF Co., N.V.

Illinois Power Fuel Company

affiliate:

Electric Energy, Inc.

Indiana Michigan Power Company

(controlled by American Electric Power Company, Inc.)

subsidiaries:

Price River Coal Company

Blackhawk Coal Company

Indianapolis Power & Light Company

(controlled by IPALCO Enterprises, Inc.)

Iowa-Illinois Gas and Electric Company

subsidiary:

Iowa-Illinois Energy Co.

Iowa Public Service Company

(controlled by Midwest Energy Co.)

Kansas City Power and Light Company

Kentucky Power Company

(controlled by American Electric Power Company, Inc.)

SA-7

Kentucky Utilities Company

subsidiary:

Old Dominion Power Company

affiliate:

Electric Energy, Inc.

Madison Gas and Electric Company

subsidiaries:

MG&E Nuclear Fuel Inc.

MAGAEL Inc.

MAGAEL Material Resources, Inc.

MAGAEL Communications, Inc.

Waters and Associates

Central Wisconsin Development Corp.

Mississippi Power Company

(subsidiary of The Southern Company)

Monongahela Power Company

(controlled by Allegheny Power System, Inc.)

affiliate:

Allegheny Generating Co.

Montaup Electric Company

(affiliated with Eastern Utilities Associates)

New England Power Company

(controlled by New England Electric System)

subsidiaries:

Massachusetts Electric Company

Narragansett Electric Company

Granite State Electric Company

SA-8

Northern Indiana Public Service Company

subsidiaries:

Shore Line Shops, Incorporated
NIPSCO Exploration Co.
NIPSCO Fuel Co., Inc.
NIPSCO Energy Services, Inc.

Ohio Edison Company

subsidiaries:

Pennsylvania Power Co.
Ohio Edison Finance, N.A.

Ohio Power Company

(controlled by American Electric Power Company, Inc.)

subsidiaries:

Central Coal Company
Central Ohio Coal Company
Central Operating Company
Southern Ohio Coal Company
Cardinal Operating Company
Windsor Coal Company

Ohio Valley Electric Corporation

subsidiary:

Indiana-Kentucky Electric Corp.

Oklahoma Gas and Electric Company

affiliate:

Arklahoma Corporation

Pacific Gas & Electric Company

subsidiaries:

Natural Gas Corp. of California

SA-9

subsidiary:

NGC Production Company

Gas Lines, Inc.

Alberta & Southern Gas Company, Ltd.

Calaska Energy Company

Standard Pacific Gas Lines, Inc.

Pacific Gas Transmission Company

affiliates:

ANGUS Biotech

ANGUS Chemical Company

ANGUS Petroleum Corp.

Alberta Natural Gas Company, Ltd.

affiliates:

ANGUS Biotech

ANGUS Chemical Co.

ANGUS Petroleum Corp.

Foothills Pipelines

subsidiaries:

Pacific Transmission Supply Co.

Rocky Mountain Gas Transmission Co.

Pacific Gas & Electric Gas Supply Co.

JWP Land Company

Pacific Gas and Electric Finance Company, N.V.

Alberta Natural Gas Company Ltd.

Pacific Conservation Services Company

Pacific Horizon Enterprises, Inc.

subsidiary:

Pacific Energy Services Co.

Pennsylvania Electric Company

(subsidiary of General Public Utilities Corp.)

subsidiaries:

Nineveh Water Co.

Waverly Electric Light & Power Co.

SA-10

Pennsylvania Power & Light Co.

subsidiaries:

Pennsylvania Coal Resources Corp.

subsidiaries:

Brush Valley Coal Corp.*
Greene Manor Coal Company
Greene Hill Coal Company
Pemico Incorporated *
Pennsylvania Mines Corp.

subsidiaries:

Tunnelton Mining Co.
Rushton Mining Co.

CEP Group, Inc.

subsidiary:

Hanover Development Corp.

Interstate Energy Company
Safe Harbor Water Power Corp.
Realty Company of Pennsylvania

subsidiaries:

BDW Corp.
LCA Leasing Corp.
Lady Jane Collieries, Inc.

The Potomac Edison Company
(controlled by Allegheny Power System, Inc.)

subsidiaries:

Allegheny Generating Company
Allegheny Pittsburgh Coal Company

* Inactive

SA-11

Potomac Electric Power Company

subsidiaries:

PEPCO Enterprises, Inc.
Potomac Capital Investment Corp.

Public Service Company of Indiana, Inc.

Public Service Electric and Gas Company
(controlled by Public Service Enterprise Group, Inc.)

subsidiaries:

PSE&G Research Corp.
Mulberry Street Urban Renewal Corp.

Salt River Project

Southern California Edison Company

subsidiaries:

Associated Southern Investment Co.
Energy Services Inc.
Southern Surplus Realty Company
Calabasas Park Company, Inc.
Mono Power Company
Bear Creek Uranium Company
Associated Southern Engineering Co.
Mono Green Mountain Co.
S.C.E. Capital Co.
Mission Energy Co.
Mission Land Co.
Northern Cimarron Resources Co.
Mission Financial Management Co.

Tampa Electric Company
(controlled by TECO Energy, Inc.)

Toledo Edison Company
(controlled by Centerior Energy Corporation)

SA-12

Tucson Electric Power Company

subsidiaries:

Valencia Energy Co.
Escavada Leasing Co.
Tucson Resources, Inc.
Tusconel Inc.
Sierrita Resources, Inc.
San Carlos Resources, Inc.

Union Electric Company

subsidiary:

Union Colliery Company

affiliate:

Electric Energy, Inc.

Virginia Electric and Power Company
(controlled by Dominion Resources, Inc.)

West Penn Power Company
(controlled by Allegheny Power System, Inc.)

subsidiaries:

Allegheny Generating Company
Allegheny Pittsburgh Coal Company
West Virginia Power & Transmission Co.

subsidiary:

West Penn West Virginia
Water Power Co.

Wisconsin Electric Power Company
(controlled by Wisconsin Energy Corporation)

Wisconsin Power and Light Company

subsidiaries:

South Beloit Water, Gas and Electric Co.
Wisconsin Power and Light Nuclear Fuel, Inc.

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NUFUS Resources, Inc.
Residuals Management Technology, Inc.
ENSERV, Inc.
REAC, Inc.
WP&L Holdings, Inc.
WP&L Communications, Inc.

Wisconsin Public Service Corporation

affiliates:

Wisconsin River Power Company
Wisconsin Valley Improvement Company
Delores Bench General Partner, Inc.
WPS Development, Inc.
WPS Communications, Inc.